COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,
 	
    Plaintiff and Respondent,
 	
    v.
 	
JOHN STEVEN JAMES,
 	
    Defendant and Appellant.
	D057014
	
	(Super. Ct. No. SCE293391)

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed.

John Steven James entered a negotiated guilty plea pursuant to *People* v. *West* (1970) 3 Cal.3d 595 to petty theft with a prior theft conviction (Pen. Code, §§ 484, 666).[1] The plea agreement included a stipulated two-year middle prison term and a *Cruz* waiver (*People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5). The *Cruz* waiver stated: "I understand that if pending sentencing I am arrested for or commit another crime, violate

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[1]   In 2005 James was convicted of two counts of petty theft with a prior. On August 9, 2009, James took the victim's purse from her grocery store shopping cart.

any condition of my release, or willfully fail to appear for my . . . sentencing hearing, the sentence portion of this agreement will be cancelled. I will be sentenced unconditionally, and I will not be allowed to withdraw my guilty . . . plea[]." After James failed to appear for sentencing, the court found that he had violated the *Cruz* waiver and sentenced him to the three-year upper prison term. James appeals, contending the court erred by finding a *Cruz* waiver violation. We affirm.

PROCEDURAL BACKGROUND

At the September 9, 2009, change of plea hearing, the court set the sentencing hearing for November 9. The court told James, "I need you to show up at the sentencing date. If you don't, the judge isn't going to follow the plea agreement." James did not appear on November 9, and the court issued a bench warrant. When James appeared in court on November 10, the court rescinded the bench warrant and continued the matter to December 1. When James appeared on December 1, the court reminded him of the *Cruz* waiver and continued the matter to January 4, 2010.

James did not appear on January 4, 2010. His attorney told the court that James was in the hospital and unable to attend the hearing. The court found that there was a potential *Cruz* waiver violation, continued the hearing to January 5, issued a bench warrant and ordered it withheld. James failed to appear on January 5. The court ordered the bench warrant served forthwith. On January 7, after James was apprehended, the court remanded him to custody without bail and continued the sentencing hearing to February 8.

On February 8, 2010, James's counsel summarized James's excuses for failing to appear on January 4 and 5.[2] On January 4, James was at the hospital being treated for a Taser wound he received from a security guard on January 2. On January 5, James went to the police station to obtain a copy of the report of the January 2 incident. While at the police station, James was arrested, apparently for being under the influence of a controlled substance. James claimed that he was taking a prescription medication as a result of the January 2 incident.

The court found that James had failed to produce evidence to support his assertion that he did not violate the *Cruz* waiver. The court concluded there was a violation. Thus, rather than imposing the stipulated sentence, the court sentenced James to the upper term.

After sentencing, James filed four letters with the court seeking modification of his sentence. Attached to the first letter is what appears to be a report, signed by James's parole officer, stating that James was jailed on January 5, 2010, after the San Diego County Sheriff's Office arrested him for being under the influence of a controlled substance. In the fourth letter James stated, "I . . . had a court date with regard to an 'under the influence' but no charge filed pending blood test results."

On March 9, 2010, the court denied James's request for modification of sentence. The court found that James had not submitted documentation showing a valid reason for his failure to appear on January 4, and his documentation showed that he violated the *Cruz* waiver on January 5 by being arrested.

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2   Counsel also referred to a letter James had written. The court reviewed the letter, which is not in the appellate record.

DISCUSSION

James contends there was no evidence to show that he committed a new crime on January 5, 2010, and his arrest on that date would not be a willful violation of the *Cruz* waiver unless a blood test proved that he was under the influence of a controlled substance. Regarding January 4, James cites his hospitalization and states, "While the court noted at the time that this was a potential *Cruz* waiver violation, it does appear the sentencing was either continued . . . or trailed to the next day, based on the representation of counsel."

Respondent contends the appeal should be dismissed because James did not obtain a certificate of probable cause. Respondent characterizes James's contention as a challenge to the validity of the guilty plea and to the "unconditional" sentence—the maximum three-year term—specified by the plea bargain in the event of a *Cruz* waiver violation. This characterization is incorrect. The *Cruz* waiver does not specify a three-year term; it provides for cancellation of the stipulation for a two-year term. (Cf. *People v. Vargas* (2007) 148 Cal.App.4th 644, 650 [certificate required where *Vargas* waiver (*People v. Vargas* (1990) 223 Cal.App.3d 1107, 1113) stated a violation would result in an eight-year sentence]; *People v. Puente* (2008) 165 Cal.App.4th 1143, 1149-1150 [certificate required to assert lack of notice of alleged *Cruz* waiver violation and failure to state reasons for finding a violation].) This cancellation restored the court's full range of sentencing options, including the two-year term and the three-year term. The restoration occurred after the entry of the guilty plea and does not affect the validity of the plea. James's contention is a challenge to the postplea finding that he violated the *Cruz* waiver.

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No certificate of probable cause was required. (*People v. Buttram* (2003) 30 Cal.4th 773, 776-777.)

On the merits, however, James cannot prevail. If the court did not believe that James was in the hospital on January 4, 2010, or if it did not believe that he was using only licit drugs on January 5, the court could conclude that James's failure to appear was willful and he was in violation of the *Cruz* waiver. (*People v. Cruz, supra,* 44 Cal.3d at p. 1254, fn. 5.) James never provided any verification of his hospitalization or lawful use of prescription drugs. Despite a continuance to February 8, James did not provide verification at sentencing. James's attorney asked the court to continue the hearing to March and to release James from custody until then. According to counsel, James believed this would allow him to "show that he was on prescription medication from the incident that put him in the hospital." The court declined to order James released, but offered to continue the hearing so James could "explore whether or not he has evidence to support his position that he didn't violate" the *Cruz* waiver. James rejected this offer and chose to be sentenced immediately. In James's four postsentencing letters to the court, filed between February 23 and March 2, he provided no evidence to support his position.

It was James's burden to show that his failures to appear on January 4 and 5, 2010, were not willful. (See *People v. Beverly Bail Bonds* (1982) 134 Cal.App.3d 906, 911.) James never provided any evidence that he was hospitalized on January 4 or improperly arrested on January 5. The court did not err by finding that James violated the *Cruz* waiver.

DISPOSITION

The judgment is affirmed.

                                          HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.